YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**GEMARA BAVA KAMA 5771**

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In loving memory of Channa Schreiber (Channa Rivka bat Yosef v' Yocheved) z"l,
with wishes for consolation and comfort to her dear children
Yossi and Mona, Yitzchak and Carmit, and their families,
along with all who mourn for Tzion and Yerushalayim.

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**Shiur #12: The Structure of Avot**

**Based on shiurim by Rav Moshe Taragin**

 The mishna seems to present the map of nizkei mammon with four separate categories - each of which is derived from a separate pasuk. Evidently, the manner in which the damage took place is of some consequence. For instance, it seems to make a difference whether the damage occurred as a result of a pit in public domain, or through the pleasure-seeking activities of an animal. Our attention is not focused merely upon the ultimate financial loss, but also upon the process by which this loss was incurred. Yet, too much attention to the process might hinder the production of toladot. Ultimately, we arrive at the following question: Does the final landscape of nizkei mammon include distinct categories (avot) characterized by the specific act of damage, or do the categories fuse into one basic form - the compensation of damages brought about by my property. This question must be explored both in the mishna and the subsequent elaboration of this issue on daf 5b-6a.

 The mishna itself provides ample scope for either model. Indeed, the opening thrust of the mishna does evoke an image of four independent tracks. As the mishna proceeds to highlight their differences, this distinction is underscored: "Lo harei ha-shor ke-harei ha-bor." Shor (literally an ox, but used here to represent moving, living damages caused by one's animals) and bor (literally a pit, representing all stationary, inanimate damages) are sufficiently different that the one cannot be inferred from the other; the Torah was forced to enumerate them separately.

Yet, the conclusion of the mishna invites a contradictory model: "Ha-tzad ha-shaveh." There does exist some point of intersection; traits which all the categories share equally. However, the Torah has already established four distinct categories of obligation which seem to cover sufficiently the range of possible scenarios. Why then does the mishna locate these points of convergence? The gemara itself poses this question (6a): "Ha-tzad ha-shaveh la-atuyei mai?" and apparently provides an answer. These categories are not "air-tight", subsuming every possible scenario under a particular av. Instead, several forms of nizkei mammon fall "between the cracks." For instance, a moving bor, placed by one person and kicked to another location by a second person, is not quite bor (since another force is involved) and not exactly shor (since it does not move under its own strength). Sewage which was emptied into the public domain for drainage, is not entirely bor (since it was discharged legally), yet not really shor either (since it does not move). Had these categories been truly separate - including only toladot which were identical to the avot - these cases would have been excluded. However, bor and shor can be combined to create composite cases, which are partly bor and partly shor, within the obligation to pay.

 In other words, despite the fact that there are separate categories which obligate payment, we still can combine categories to form composite cases. The discovery of composite cases therefore, is not necessarily inconsistent with the idea of distinct categories.

**Alternate model**

 The sugya on 5b, however, could be suggesting a completely different model of the obligation of nizkei mammon. The gemara, in a sense, rejects the premise of the mishna. The mishna maintains that the four avot are sufficiently different so that the one cannot be inferred from the other; hence the Torah listed each one. The gemara responds that if the Torah had written bor plus any one other category (ki shadit bor ve-chad minaihu), we could indeed have derived all other cases. Why then, questions the gemara, did the Torah need to write all four?

 Before examining the gemara's answer we must appreciate the question. Suppose the Torah wrote only bor and one other? How might we relate to the "derived" cases? Would they all have been considered offshoots of bor? Would they all have fitted, neatly or otherwise, into the category of "av-bor?" Or might we have conceived of a different model for nizkei mammon? Might we have suggested that the obligation to pay stems from a general factor: My possession caused your loss and I must compensate (mamono she-hizik)? Any case which meets this condition - REGARDLESS OF HOW THE DAMAGE OCCURRED - would then be obligated to pay. Had the Torah not itemized four categories but merely two scenarios, would I have continued to view these descriptions (bor plus one) as formal categories which establish grounds for obligation? Or would I have read bor as a general example of a situation of mamono she-hizik, which I might have extrapolated to any and every such case regardless of the particular motive or form of damage?

 This question, which strikes at the heart of how we view the structure of nizkei mammon, impacts upon a significant practical issue. At this stage of the gemara (if the Torah would have written only bor and another, and the rest would have been deduced), would those derived nezikin have been bor-extensions or not? The owner of a bor compensates only for damage to animals and not for the damage of utensils (shor ve-lo adam, chamor ve-lo keilim). According to this approach, would these bor-derived cases have been obligated to pay for keilim? Tosafot (5b s.v. Le-hilkhoteihen) claim that they would have been offshoots of bor and would not have paid for keilim. Consequently, all derivatives would be identified as bor-offshoots and would share all the specific idiosyncrasies of bor.

Rav Velvel (the Griz - uncle of Rav JB Soloveitchik zt"l) suggests otherwise: Had the Torah written only bor and one more, instead of enumerating four different categories, bor would have been viewed as an example of the general notion of mamono she-hizik, rather than as a distinct category. Cases deduced from bor plus one, would have been labeled and understood as mamono she-hizik, which the Torah happens to introduce by using a specific example - one who digs a pit in public domain (reshut ha-rabim). Though this particular example carries an exemption for keilim, the general obligation to pay does not necessarily include this exemption. Tosafot claim, the derivatives would be identified as bor spin-offs and would share all the specific idiosyncrasies of bor. However, if bor would be merely ONE EXAMPLE of a more general system, derived mazikin would exist independent of bor and ironically would be obligated to pay for things which bor is not.

 Of course, this alternate model was suggested to explain what we might have thought, assuming the Torah listed only bor with one more av. What structure do we adopt, seeing as the Torah DID specify separate categories? We must return to the gemara's response on 5b. Why indeed did the Torah painstakingly list four avot when it could have recorded two comprehensive ones? At this stage, we might expect the gemara to respond as follows: In the final analysis, avot do NOT merge into one general system, but retain their unique and formal differences. One cannot be obligated to pay merely because IN GENERAL his property caused damage. One pays because the damage falls under one of the Torah's specific categories. To convey this sense of formal categories rather than one overarching mechayev (obligating factor), the Torah listed four distinct sections. In truth, the Torah could have written one or two and allowed us to derive the remainder. However, that presentation would have prompted us to establish a general mechayev by blurring the differences between bor and the other avot. By delineating each and every av, the Torah in effect establishes firm and distinct categories which forces us to adopt a very different model of avot nezikin than we might otherwise have conceived.

 Though this would certainly be the answer we would expect the gemara to provide, it remains questionable whether in fact, this is the response given. The gemara answers that the Torah wrote each and every av (even though they do not differ regarding the basic notion of payment), because they each express isolated and unique exemptions. Bor is exempt from paying for utensils which it damages; while eish (fire) is absolved from hidden items (tamun). Regel (leg) and shen (tooth) do not pay for damages occurring in reshut ha-rabim; while keren (horn) pays only half-reparations (as long as it is still a "tam" - considered tame). This need to specify "le-hilkhoteihen" (distinct cases in which exemptions apply), forced the Torah to enumerate separate avot rather than rely upon deduction from bor and another av. The gemara seems to fall short of our expected mark (we presented it above). Instead of trumpeting the existence of distinct categories enabled by separate delineation, the gemara seems to adopt the basic premise of the question - namely that avot COULD HAVE BEEN derived from others - and merely excuses the final map because of the need to develop local exemptions.

 We are left with a bit of uncertainty regarding the gemara's final position. We can indeed interpret the gemara's conclusion to fit the answer we had expected. Theoretically, we could have derived all the avot from bor plus one. But this would have led to a model of nizkei mammon in which differences blur, categories disappear and everything is referred to as mamono she-hizik. Not desiring such a model, the Torah specified different categories. For situations of nezek to obligate payment, they must be subsumed under a specific category. The best way to appreciate the distinction between these categories is to study their exemptions - the area in which their divisions are most manifest. If we take this approach, the gemara indirectly provides the answer we anticipated: The Torah mapped out four distinct categories rather than producing a generic obligation to pay for nizkei mammon.

 By contrast, Rav Velvel assumes that ultimately, it is the GENERAL FACTOR of mamono she-hizik that obligates one to pay in particular cases of nezek. This baseline of obligation applies any time that one's property causes damage due to his negligence. The only reason the Torah defined formal categories, was to announce exceptions to this baseline of obligation. Accordingly, this might seem to be the straight-forward reading of the sugya on 5b. The gemara initially challenged the Torah's decision to list all four avot by indicating that they might have been derived from bor. Tosafot understood these potential avot, learnt from bor, as extensions of bor. Rav Velvel asserted that this initial position reflected a general mechayev, of which bor is just an example. Had the Torah only written bor, we would have established a generic chiyuv for mamono she-hizik. Notably, the gemara's answer does not retreat from this position. Instead, assuming this general baseline chiyuv, the gemara still needs to delimit specific exceptions for bor, eish, regel etc. According to Rav Velvel, therefore, the final model does indeed retain a baseline generic chiyuv for all mamono she-hizik, with particular exceptions applying to specific formal categories.

**Differences between the models**

Having outlined two different models for structuring the system of nizkei mammon and having traced these two options through the different stages of the mishna and the ensuing gemara on 5b, we will now examine tangible differences upon which these two models would potentially impact.

A) Nizkei mammon which are direct derivatives of a particular mazik:

We already alluded to the sugya on 6a which discusses situations that lie somewhere between bor and shor. These examples are derived from a combination of factors from bor and from shor. What exactly is their halakhic breakdown regarding the particular exemptions which apply to both bor and shor. This issue forms the essence of a machloket Rishonim cited in the Rosh (BK 1:1). Some claim that these cases, derived from two avot, inherit the leniencies of BOTH avot. In other words, a moving bor (derived from bor and shor) would obligate payment only in reshut ha-yachid (private domain - like regel which is exempt in reshut ha-rabim) and only for animals and not utensils (like bor which is absolved from payments for utensils). The Rosh himself disagreed, since these are in fact not derived from two avot, but rather are, for all intents and purposes, BOR. The gemara never intended to deduce them from two avot. Rather, recognizing that subtle differences between classic bor and these cases do exist, the gemara cited shor to highlight the insignificance of these differences. We might have suggested that discharged sewage is less of a mazik than bor, since it was placed with permission. To this purpose the gemara cites the concept of shor to demonstrate that permission (in this case, to lead an animal beyond your home) does not necessarily mitigate the obligation to pay for subsequent damages. The gemara never intended to affix these cases to two parents; instead they are considered bor and they share the properties of bor (exemption from keilim). Shor was introduced merely to prove that the subtle differences between these cases and classic bor were inconsequential.

 However, both the Rosh himself and the first position he quotes, agree upon one basic structural point: derivatives stem from specific categories of nizkei mammon and they must inherit their properties (exemptions). The only disagreement surrounds whether they are derived from ONE category or TWO. Rav Velvel's approach would facilitate a third possibility: These derived models are based upon no specific category but rather upon the general baseline of mamono she-hizik and obligate payment because they meet those general conditions. Not being classified as any particular av or category excludes them from all exemptions. They are mechayav both in reshut ha-rabim and for damages to utensils, since their baseline responsibility is generated and no particular exceptions apply to them. In the end we are left wondering about the identity of these cases on 6a: Are they a composite of bor and shor? Are they basically bor? Or do they provide examples of situations which defy classification and are chayav because of a general obligation to pay?

 This concept of a "no-name" case is expressed more explicitly by Rishonim in another context. If someone leaves an item on his roof and a wind carries it into reshut ha-rabim where someone ultimately trips over it, he must pay. Apparently, this would be a situation akin to bor. Rav, however, (see 3b and 28b) refuses to classify this as bor since he still retains ownership over the displaced item (mamono). According to Rav, bor is characterized by LACK of ownership (digging a pit in reshut ha-rabim). Unable to easily classify this as bor, Rav refers to it as MAMONO. Rishonim disagree as to Rav's intention. Rashi (28b) assumes that, according to Rav, this relocated item is considered shor - paying for the damages of an item you own. The Rashbam (see Tosafot 3b) rejects this neat classification as shor, since an animal is animate. In other words, Rashi and the Rashbam dispute the identity of this mazik. They agree, however, that the item must be endowed with a particular identity. The Ra'avad (BK 28b) is troubled to find an identity for this mazik. He finally raises our third possibility: "...When he does not repudiate ownership over the item (and hence it cannot be bor). Rav considers it mazik be-mamono which he was negligent in."

In other words, it is possible to create a chiyuv without affixing it to any particular category of mazik. What was suggested within the sugya of 6a was explicitly stated in a related context - the sugya of 28b.

B) Can a tolada be more severe than an av?

The phenomenon of toladot describes cases not written in the Torah but sufficiently similar to avot to be generated (either independently or through direct authorization in the Torah). How closely does a tolada "shadow" an av? Does it merely receive its basic halakhot from the av, or does it mirror it exactly? This question is apparently posed by the gemara itself when it questions: "toladoteihem ka-yotzei bahem o lav ka-yotzei bahem," - are the toladot similar to the avot or different? Toladot are obviously chayav (if not, why would they be referred to as toladot) but are they chayav exactly as an av or not? This question on its own does not directly address our issue. However, the Rif provides a novel understanding of this question. What the gemara really wanted to know was whether a tolada shares the exemptions of the av. Would a tolada of bor be excused from payments on utensils, as bor itself is? If toladot are not identical to the avot, then in fact toladot are viewed as being obligated to pay, without the respective exceptions. This creates the strange situation that a tolada derived from an av has more severe requirements regarding payment than the av, which is explicitly mentioned in the Torah. If anything, we would have expected the opposite: that a tolada derived from an av should be less severe. How might we explain this irony?

 Rav Velvel employs his concept, once again, to justify this phenomenon. The gemara was considering that toladot are not similar enough to their respective avot to receive the formal title of bor, eish, or shen. They might be chayav because they conform with the general condition of mamono she-hizik; but since they do not constitute formal categories, they are excluded from specific exemptions. In other words, the gemara is probing the general ability to stretch these categories (and the exemptions they enjoy) beyond the literal boundaries of the biblically specified case. Might the entire world of toladot be something which does not fit into categories but is still obligated to pay because it meets the condition of mamono she-hizik?

 Ultimately, of course, after studying the respective toladot and realizing that in fact they are VERY similar to avot, the gemara concedes that "toladoteihem ka-yotzei bahem". The toladot are so comparable that they receive their respective labels and enjoy the consequent exemptions. In the end, the only situations which defy neat categorization according to Rav Velvel's approach would be those ambivalent cases (6a and 28b according to Rav). However, the gemara's willingness to consider toladot as "free agents" - obligated to pay but not tethered to any one av - seems to support Rav Velvel's contention: the categories and labels do not obligate - they merely exclude payment in certain situations. Obligation to pay can stem from a general condition of mamono she-hizik.

Mekorot for next week's shiur:

Sources and Questions for next week's shiur: "Meitav Sadeihu Yeshalem" - The Relationship Between the Form and Content of Payment for damages

1) See gemara 6b "T"R ... (7a) mazik." What is the difference between the two formulations of R. Akiva's position (two beraitot)? What possibilities did the initial formulation cause the gemara to consider both, according to R. Akiva and according to R. Yishmael (see also Tosafot s.v. Ve-Rebbi)?

2) See gemara 59a "Amar Abaye ... de-salik." How is Abaye's suggestion similar to those made by the gemara on 6b? See also Tosafot s.v. U-mai. How do these suggestions force us to broaden our understanding of R. Yishmael? See also Tosafot Rosh (and Penei Yehoshua) on Gittin 48b s.v. Amar. How might these suggestions be reflective of a particular understanding of the nature of damage payments?

3) See gemara Gittin 49b "De-tanya ... yeshalem" and Mishna/Rashi 48b. What are the possible ways of understanding the purpose of payment from "idit?" How might the argument between R. Akiva and R. Yishmael be reflective of this question? Could this issue be dependent on the issue raised in question 2?

4) See gemara 7b "ba'i ... nami," 7a "rami ... karcho," Rabbeinu Chananel s.v. Rami. How is Rabbeinu Chananel's understanding of the gemara on 7a similar to the gemara's suggestion on 7b? How can the similar linkage be justified?

5) See Rosh siman 2, s.v. She-lo. What debate does the Rosh quote regarding R. Yishmael's position? How can one understand the position the Rosh actually favors?